

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Ronald A. Guzman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	01 C 480	DATE	2/12/2002
CASE TITLE	USA, ex rel JOHNNIE B. JONES vs. MICHAEL V. NEAL		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

--

DOCKET ENTRY:

- (1) ☐ Filed motion of [use listing in "Motion" box above.]
- (2) ☐ Brief in support of motion due _____.
- (3) ☐ Answer brief to motion due _____. Reply to answer brief due _____.
- (4) ☐ Ruling/Hearing on _____ set for _____ at _____.
- (5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
- (7) ☐ Trial[set for/re-set for] on _____ at _____.
- (8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.
- (9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ General Rule 21 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).
- (10) ☒ [Other docket entry] ENTER MEMORANDUM OPINION AND ORDER: Petitioner Johnnie B. Jones is not exempt from having to exhaust state court remedies before proceeding on his federal habeas petition. Petitioner, Johnnie B. Jones' federal habeas petition is dismissed. [7-1].
- (11) ☒ [For further detail see order attached to the original minute order.]

<input type="checkbox"/> No notices required, advised in open court. <input type="checkbox"/> No notices required. <input type="checkbox"/> Notices mailed by judge's staff. <input type="checkbox"/> Notified counsel by telephone. <input checked="" type="checkbox"/> Docketing to mail notices. <input checked="" type="checkbox"/> Mail AO 450 form. <input type="checkbox"/> Copy to judge/magistrate judge.	TBK courtroom deputy's initials	U.S. DISTRICT COURT CLERK 02 FEB 12 PM 7:38 Date/time received in central Clerk's Office	number of notices	Document Number 15
			FEB 13 2002	
			date docketed	
			docketing deputy initials	
			date mailed notice	
		mailing deputy initials		

petition; the matter is still being continued and the appointed counsel has yet to file an amended petition on Petitioner's behalf.

Meanwhile, on January 23, 2001, Petitioner filed a pro se petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 2254. In the habeas petition, Petitioner claims he has been deprived of due process and equal protection because the proceedings on his post-conviction petition have been unduly delayed; that he was deprived of due process and equal protection because his sentence is disparate to that of his co-defendant; that he has been deprived of due process and equal protection because the Cook County State's Attorney's Office has not complied with the state post-conviction relief statute in that counsel was appointed to represent Petitioner; and the proceedings on the matter have been unduly delayed.

On February 2, 2001, this court directed the respondent to address the issue of undue delay in the state post-conviction proceeding. The respondent filed this motion to dismiss on the ground that Petitioner had failed to exhaust his state court remedies.

Discussion

Federal courts may issue a writ of habeas corpus if a petitioner demonstrates that he is "in [state] custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Moffat v. Gilmore*, 113 F.3d 698, 702 (7th Cir. 1997). The petitioner is entitled to federal habeas relief when he has exhausted all available state remedies and fairly presented his constitutional claims to the state courts. *Mornient-El v. DeTella*, 118 F.3d 535, 538 (7th Cir. 1997). A petitioner has exhausted his state court remedies when he has previously presented the constitutional issue to the highest state court for a decision on the merits or when he has no further means for obtaining review of his conviction in state court. *Wallace v. Duckworth*, 778 F.2d 1215, 1219 (7th Cir. 1985). This requirement is "grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731, (1991). If Petitioner fails to satisfy these requirements, the petition is barred either for a failure to exhaust state remedies or for procedural default. *Henderson v. Thieret*, 859 F.2d 492, 496 (7th Cir. 1988).

Although Petitioner has not exhausted his state court remedies, he asks this court for habeas corpus relief based on the seven years that his state petition has been pending. He argues

that this delay violates his right to due process and equal protection under the federal constitution.

There are two exceptions to the exhaustion requirement: 1) if there is no state corrective process available, or 2) if circumstances exist which render such process ineffective to protect the prisoner's rights. 28 U.S.C. § 2254 (b); *Sceifers v. Trigg*, 46 F.3d 701 (7th Cir. 1995). Petitioner argues that the excessive delay of seven years has rendered the state processes ineffective. (Pet.'s Reply, p. 4) *Jenkins v. Gramley*, 8 F.3d 505, 508 (7th Cir. 1993); *United States ex rel. Davis v. Gilmore*, 1990 WL 7183, at *2 (N.D. Ill. Jan. 16, 1990).

The Seventh Circuit has previously held that when state court delay is "inordinate," a district court must hold a hearing to determine whether the delay is justifiable. *Dozie v. Cady*, 430 F.2d 637, 638 (7th Cir. 1970). If the delay cannot be justified, the court must hear the habeas petition on its merits. *Lowe v. Duckworth*, 663 F.2d 42, 43 (7th Cir. 1981). Inordinate, unjustifiable delay in a state court collateral appeal can excuse a Petitioner from the exhaustion requirement. *Jackson v. Duckworth*, 112 F.3d 878, 881 (7th Cir. 1997).

Here, Petitioner argues that his court-appointed state attorneys have caused the delay by repeatedly consenting to continuances every three months since 1994. However, the case law in the Seventh Circuit is clear that there is no constitutional right to an attorney in collateral proceedings, and therefore errors committed by appointed counsel are not attributable to the state. *Lane v. Richards*, 957 F.2d 363, 365 (7th Cir. 1992) (citing *Pennsylvania v. Finley*, 481 U.S. 551, (1987)). Thus, as in *Lane*, neither the seven-year delay nor the continuances (to which Petitioner's lawyers consented) can be charged to the Illinois judiciary. As a result, these delays do not render the state process ineffective under § 2254(b)(1)(B)(ii). *United States ex rel. Walton v. Gilmore*, 1997 U.S. Dist. LEXIS 1213 No. 96 C 2375 at *2 (January 31, 1997); *Sceifers*, 46 F.3d at 703-4 (holding that a delay of 132 months was not inordinate because it was partially the fault of petitioner's counsel); *Lane*, 957 F.2d at 365 (holding that a delay of sixty-two months was not inordinate because the petitioner's public defender requested a continuance); *United States ex rel. Hayes v. Washington*, 1995 U.S. Dist. LEXIS 6933, No. 94 C 942, 1995 WL 314545, at *2 (N.D. Ill. May 19, 1995) (holding that a delay of approximately sixty months was not inordinate because the petitioner's attorney did not object to a number of continuances).

Although the delay in his case is appalling, Petitioner has never filed a motion to have his court appointed counsel removed. To obtain prompt hearing, prisoner may have to choose


between being represented by counsel on collateral attack and proceeding pro se. *Hayes*, 1995 U.S. Dist. LEXIS 6933, No. 94 C 942 at *6 (citing *Lane*, 957 F. 2d at 364-65). The law is clear that the court cannot excuse petitioner from fulfilling his requirement to exhaust state court remedies.

Conclusion

For the above reasons, Petitioner Johnnie B. Jones is not exempt from having to exhaust state court remedies before proceeding on his federal habeas petition. Petitioner's federal habeas petition is dismissed (#7-1).

SO ORDERED:

ENTER. 2/12/02


HON. RONALD A. GUZMAN
United States Judge